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Search and Seizure Without Warrant-Intoxicating Liquor-Timely Objection

SEARCH AND SEIZURE WITHOUT WARRANT — INTOXICATING LIQUOR — TIMELY OBJECTION.—Officers having information that intoxicating liquor was to be delivered at a certain place, stationed themselves there. The defendant with three companions stopped the car he was driving at this place. As the four men alighted from the coupe, the officers confronted them with pistols. The defendant fled, was fired at several times, but escaped. The officers arrested his three companions, seized the car, broke the lock on it and found intoxicating liquor. Said officers had no warrant of any kind. Defendant was subsequently arrested, and at his trial for transporting intoxicating liquor, held some eleven months later, he objected to introduction of the officers' testimony as to the results of the search, no motion to quash such evidence having been filed. Objections overruled, defendant appealed. *Held,* reversed, new trial ordered, search being based on mere suspicion was illegal, and evidence was thus wrongfully introduced. (Martin, J., dissenting.) *Karlen v. State,* Supreme Court of Indiana, December 31, 1930, 174 N. E. 89.

It is well established that an officer may make an arrest or conduct a search and seizure without a warrant on reasonable and probable cause for believing the person arrested or whose property is searched is committing or has committed a felony. *Koscielski v. State,* 199 Ind. 546, 158 N. E. 902; *De Long v. State,* 201 Ind. 302, 168 N. E. 22; *Long v. State,* 89 Ind. App. 496; 167 N. E. 140; *Murphy v. State,* 197 Ind. 360, 151 N. E. 97; *Boyd v. State,* 198 Ind. 55, 152 N. E. 278; 4 Ind. Law J. 311.

The United States Supreme Court stated the rule thus: "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." *Carroll v. United States* (1923), 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790. The application of this rule is often, however, exceedingly complicated.

Suspicion alone does not give probable cause. *Edwards v. State,* 152 N. E. 721; *Doncaster v. State,* 151 N. E. 724; *Hart v. State,* 145 N. E. 492; *Robinson v. State,* 197 Ind. 144, 149 N. E. 891. But previous information plus suspicious actions on the part of the parties searched have often been held to constitute probable cause, as the following cases will show.

In *Long v. State, supra,* it was held that a sheriff receiving a report that defendant was hauling liquor in a described auto, was justified in arresting him on his admitting ownership of the described car.

In *Hanger v. State,* 199 Ind. 727, 160 N. E. 449, a sheriff had received information by telephone from one who saw defendant loading jugs into his auto that "those cars are in at R's again." On approaching the place where the officers were waiting on the highway for him, the defendant abandoned his car, and fled until overtaken and arrested. It was held that there was sufficient cause for search and arrest without a warrant. The dissenting judge in the principal case in writing the opinion of *Hanger v. State,* said, "If an officer, from the exercise of his own sense, coupled with information from sources so reliable that a prudent and careful person, having due regard for the rights of others, would act thereon, has reasonable and probable cause to believe that the offense of unlawful transportation of intoxicating liquor in an automobile is being committed in his presence, and he has no opportunity to obtain a warrant, he may search and seize the auto, which is believed to be carrying such contraband liquor."

Faut v. State, 201 Ind. 322, 168 N. E. 124, held that an anonymous telephone call to officers that a described automobile tank car was transporting intoxicating liquor was insufficient ground for searching such automobile. But when the officers, acting on such information, found a tank wagon without the usual oil faucets, bearing no lettering indicating the name of its owners, and having only one foreign license plate, said truck stopping only after repeated demands, they were held to have sufficient reasons to search the tank without a warrant. This opinion was also written by the judge who dissented in the principal case.

In *Hinds v. State,* 170 N. E. 539, officers had information from chief of police that someone in a car bearing a license number from the southern part of the state would be through their city with liquor. They saw a car bearing such license as to show that the car was from the southern part of Indiana and when they approached it saw a jug partly uncovered and also smelled intoxicating liquor. Reasonable and probable cause was correctly found.

In the absence of any information at all from outside sources, various acts of the parties or attending circumstances of comparatively slight nature have been held to constitute probable cause in many cases. In *Greer v. State,* 201 Ind. 386, 168 N. E. 581, the defendant abandoned his automobile and fled upon approach of officers. The latter smelled whisky in the car, and were held to have reasonable and probable cause to believe the defendant was engaged in transporting liquor. In *Burnett v. State,* 155 N. E. 209, an officer seeing defendants in possession of a truck loaded with tin cans, and smelling the odor of liquor emanating therefrom was held justified in making an arrest without a warrant.

These cases have been thus outlined to reveal the fact that there is a very close question of fact presented in the principal case as to whether

probable cause existed. They also show that one judge has consistently found probable cause where others have failed.

The Indiana cases that previously have failed to find probable cause under similar circumstances seem on the whole much farther from the line than the case in question. In *Batts v. State*, 194 Ind. 609, 144 N. E. 23, a sheriff and his deputies stationed themselves on a highway and stopped and searched passing machines without discrimination. They signalled to the defendant to stop, but he turned around and drove rapidly in the other direction until bullets fired by deputies stopped his car. A search followed. The sheriff admitted he had no warrants for anyone, and had not suspected the defendant or had seen any violation of the law by him. The defendant declared that he believed himself confronted by robbers. The search was held to be unreasonable, and the case is now often cited for the proposition that flight alone is insufficient to create probable cause. The entire set of facts, however, rather limits the force of the case on this proposition.

Eiler v. State, 196 Ind. 562, 149 N. E. 62, was clearly a case of mere suspicion. Officers on approaching defendant's car dimmed their lights, then turned them on bright again. Defendant did the same. Officers repeated the act, and so did the defendant. The officers believing defendant understood their act to be a signal, stopped his car and searched it. Obviously this search was illegal.

A case similarly clear is *Boyd v. State*, 198 Ind. 55, 152 N. E. 278, in which the defendant while driving a taxi was seen exchanging packages with a negro. A search followed, which was correctly pronounced illegal. Thus it seems that the courts have gone closer to the line in holding seizures legal than they have in declaring them illegal. On one side is the constitutional right against unlawful search and seizure, on the other the problem of enforcing prohibition in the face of prevalent violation. The principal case holds that information of a future delivery of liquor plus flight is insufficient to constitute probable cause. It is a question that has not been directly decided in Indiana before, and obviously has its difficult points. Probably in case of doubt the decision should be in favor of constitutional guaranties.

Assuming, however, that the evidence was illegally obtained, another question remains. "Is the right to object to admission of such evidence lost unless a motion to quash it has been timely made?" The Appellate Court so held in *Hantz v. State*, (1929) 166 N. E. 439. A seemingly exhaustive review of the law on this point was made in the opinion, and the "almost universal rule" was recited to be that a court will not, after actual commencement of a trial by the introduction of evidence, entertain such motive and thus try a collateral issue, except where the knowledge of possession of such evidence was at this time first learned by the party objecting.

The old doctrine was that "evidence is not inadmissible against the accused in a criminal case because it was obtained by an illegal search and seizure." 24 A. L. R. 1411. There are many cases therein cited that support this general rule of evidence, with no reference to any right of objection. This rule is vigorously defended by Professor Wigmore in *American Bar Association Journal*, August, 1922, p. 479.

On the other hand there are many modern cases holding that evidence obtained by illegal search and seizure is absolutely inadmissible. 24 A. L. R. 1417. In 1914 the Supreme Court in *Weeks v. United States*, 232 U. S. 383, held constitutional rights supreme when asserted before trial, and subsequent cases in that court have recognized the constitutional right as taking precedence over the above mentioned general rule of evidence although first asserted at the trial. 24 A. L. R. 1417. This view was vigorously assailed by Professor Wigmore in his above mentioned article, but was supported in *American Bar Association Journal*, October, 1922, p. 646, by Cannor Hall.

Thus there are actually three theories, with many cases to support each, instead of "an almost universal rule"; one holding the evidence admissible despite illegal search and seizure, another holding such evidence absolutely inadmissible, and the third requiring an objection made before trial (24 A. L. R. 1421), in accord with the rule of *Hantz v. State, supra.*

But this last rule has been quite ingeniously ignored by the Supreme Court of Indiana. In fact, frequently a reversal has been ordered where the objection to the evidence was first made at the trial. *Thompson v. State*, 198 Ind. 496; *Conner v. State*, 167 N. E. 545; *Walker v. State*, 142 N. E. 16. The second rule was apparently followed in *Callender v. State*, 193 Ind. 91, 138 N. E. 817, which flatly held that "property seized under an invalid search warrant is inadmissible."

On the other hand, *Hantz v. State, supra,* has never been expressly overruled. In the case in question, the trial came some eleven months after the search and arrest. Applying the rule of the Appellate Court, the right to object clearly was lost, but the Supreme Court chose to add this case to those that decided contra to the rule without any mention of its existence. Martin, J., is decidedly correct in stating that the profession and the Appellate Court are entitled to a definite settlement of the quesion by the Supreme Court.

P. J. D.